United States Court of Appeals

for the Second Circuit

APPENDIX

77-1034

77-1034 & 1040

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

PASQUALE PICCIRILLO,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX OF THE DEFENDANT-APPELLANT

Docket No. 77-1034
Docket No. 77-1040

LOUIS A. SOMMA
Attorney for Defendant-Appellant
250 West 57th Street
New York, New York 10019
(212) 586 - 2774

UNITED STATES COURT OF APPEALS
FILED
APR 18 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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No. 1

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

PASQUALE PICCIRILLO,

Defendant.

Docket Number 76 CR 668

THOMAS C. PLATT
(District Court Judge)

NOTICE OF APPEAL

Notice is hereby given that PASQUALE PICCIRILLO appeals to the United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ order ☐ other (specify) _____ entered in this action on January 14th, 1977 .
(Date)

LOUIS A. SCIMA
(Counsel for Appellant)

Address 250 West 57th Street
New York, N. Y. 10019

Date January 14th, 1977

To:
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

Phone Number 586 - 2774

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY) TRANSCRIPT INFORMATION – FORM B

▶ QUESTIONNAIRE

☐ I am ordering a transcript
☐ I am not ordering a transcript
Reason:
☐ Daily copy is available
☐ U.S. Attorney has placed order
☐ Other. Attach explanation

▶ TRANSCRIPT ORDER

▶ DESCRIPTION OF PROCEEDINGS FOR WHICH TRANSCRIPT IS REQUIRED (INCLUDE DATE).

Prepare transcript of
☐ Pre-trial proceedings
☐ Trial
☐ Sentence
☐ Post-trial proceedings

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ▶ Method of payment ☐ Funds ☐ CJA Form 21

ATTORNEY'S signature _____ DATE _____

▶ COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and forwarded to Court of Appeals.

Date order received	Estimated completion date	Estimated number of pages.

Date _____ Signature _____
(Court Reporter)

COPY FOR DEFENDANT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

-against-

DOMINICK LINARELLO,
PASQUALE PICCIRILLO,
MARIA PICCIRILLO and
CARMINE MERCOGLIANO,

Defendants.

- - - - - - - - - - - - - - - - - - X

77-1034 No. 2

INDICTMENT

Cr. No. 76/608
(T. 18, U.S.C. §§922(a)(1), 923, 924, 2; T. 26, U.S.C. §§5861(e), 5871)

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between the 13th day of May 1975 and the 3rd day of September 1976, both dates being approximate and inclusive, within the Eastern District of New York, the defendants PASQUALE PICCIRILLO, MARIA PICCIRILLO and CARMINE MERCOGLIANO, did knowingly and unlawfully engage in the business of dealing in firearms and ammunition, the defendants PASQUALE PICCIRILLO, MARIA PICCIRILLO and CARMINE MERCOGLIANO not being licensed dealers in firearms and ammunition as required by Title 18, United States Code, Section 923, and during the commission of this offense the above-named defendants were aided and abetted by DOMINICK LINARELLO, a federally licensed gun dealer. (Title 18, United States Code, Sections 922(a)(1), 923, 924 and 2).

COUNT TWO

On or about the 27th day of July 1976, within the Eastern District of New York, the defendants DOMINICK LINARELLO and PASQUALE PICCIRILLO did knowingly and unlawfully transfer a "firearm", as defined by Title 26, United

States Code, Sections 5845(a) and (d), to wit, one single barrelled, 12 gauge, J.C. Higgins shotgun, Model 583-1100, containing no serial number, having a barrel length of approximately 11 inches and an overall length of approximately 27 1/2 inches, said sawed-off shotgun not having been registered to the defendants DOMINICK LINARELLO and PASQUALE PICCIRILLO in the National Firearms Registration and Transfer Record. (Title 26, United States Code, Sections 5861(e) and 5871 and Title 18, United States Code, Section 2).

COUNT THREE

On or about and between the 5th day of April 1976 and the 3rd day of September 1976, both dates being approximate and inclusive, within the Eastern District of New York, the defendant DOMINICK LINARELLO, a federally licensed gun dealer, knowingly and unlawfully did fail to make appropriate entries and properly maintain records which he is required to keep pursuant to Title 18, United States Code, Section 923 and the rules and regulations promulgated thereunder. (Title 18, United States Code, Sections 922(m) and 924).

A TRUE BILL

FOREMAN

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

FELONY Fel X | JUDGE/MAGISTRATE Assigned 0720 | 207 1 District Office | Disp./Sentence

U.S. vs. 76 CR 608 (CLOSED) EAST, J.

(LAST, FIRST, MIDDLE) PASQUALE PICCIRILLO

No. of Defts 4

76 608 No. 4
Yr. Docket No. Def.

U.S. MAG CASE NO. 76 M 1774

US TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
18:922(a)(1),923, 924, & 2; T-26: 5861(e), & 5871	Did unlawfully engage in the business of dealing in firearms and ammunition; did unlawfully transfer a firearm.	3

SUPERSEDING COUNTS

RELEASE
Denied | Set | AMT $10,000 | Date 9/3/76
Fugitive | Pers Recog. | PSA
conditions: 10% Deposit | X Surety Bond | Collateral | 3rd Prty Cust | Other
Bail Not Made | X Status Changed (See Docket)

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT X	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Began	High Risk Date	9/30/76	11/8/76	1/5/76
Summons Served	Information 9/23/76	1st Plea II		Disposition of Charges: On All Charges / On Lesser Offense(s)
First Appearance 9/3/76	Indict. Waived	Final Plea	11/18/76	Convicted / Acquitted / Dismissed / WOP / WP
	Charging District	Superseding Indict/Info		On Government's Motion

MAGISTRATE

	DATE	INITIAL/NO
Search Warrant: Issued / Return		
Summons: Issued / Served		
Arrest Warrant Issued		
COMPLAINT ▶	9/3/76	VAC/070A
OFFENSE (In Complaint)	Sale of unlicensed firearms - T. 18 USC §§922(a)(1) & 923, 924, 2	

INITIAL APPEARANCE DATE ▶ 9/3/76 — INITIAL/NO
PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled ▶ 9/14/76 / Date Held ▶
WAIVED / NOT WAIVED / INTERVENING INDICTMENT
Tape Number

OUTCOME: DISMISSED / HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT / HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.
Richard Appleby, Esq.

ATTORNEYS Defense / CJA / Ret / Waived / Self / None / Other / PD / CD
Ressler & Agate, Esqs. 9/14/76- L. Somma, Esq.
123-33 83rd Ave 250 W. 57th St
Kew Gardens, NY New York, NY
(May be retained)

Show last names and suffix numbers of other defendants on same indictment/information

DOMINICK LINARELLO,1; MARIA PICCIRILLO 3; CARMINE MERCOGLIANO 4

DATE	(DOCUMENT NO.) PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
9/10/76	Recd. a call from Jeffrey Ressler, Esq. who stated that his firm is being retained by the defts (See above address) and that he will send us a letter stating that fact - he is also waiving hearing and has been in touch with the AUSA - letter of confirmation of this information to follow by 9/14/76	
9/14/76	As per Mr. Ressler's Office, they will not be retained see notation as to new atty. above.	
	**Both defts released on 9/3/76 with security by property of 140 McKinley Ave., B'klyn NY	
9-14-76	Case adjourned to September 23, 1976 at 2:00 PM	
9-23-76	Deft. indicted - no number available.	
9/23/76	Before CATOGGIO, J. - Indictment filed.	
9/30/76	BeforePLATT, J. - Case called. Deft & Counsel present. Deft waives reading of Indictment and enters a plea of not guilty. Motions set down for 10/18/76 at 9:30 a.m. Bail continued.	

DATE	IV. PROCEEDINGS (continued) (DOCUMENT NO.) PAGE TWO	V. EXCLUDABLE DELAY Interval (a)	Start Date End Date (b)	Cat. (c)	Total Days (d)
10/18/76	Before PLATT, J. - Case called. Deft & Counsel present. Defts motions for discovery withdrawn with leave to renew. Trial set down for 10/26/76 at 9:30 a.m.				
10-26-76	Before Platt, J.- Case Called. James Bernard is ordered substituted for Louis Rosenthal as atty. for Deft. MERCOGLIANO Trial set down for 11-3-76 at 9;30 A.M.				
11-8-76	Before Platt, J.- Case Called. Deft. & Counsel present. Trial ordered and begun. Deft. Piccirillo's motion to dismiss - denied to leave to renew. Deft's motion to suppress - denied to leave to renew. Deft's motion for discovery - Decision reserved. Deft. motion for discovery renewed (re: informant) - granted. Trial held and continued to 11-9-76 at 10:00 A.M.				
11-9-76	Before Platt, J - case called - deft & atty present - defts motion for CJA transcript denied; defts motion for production of witness denied - trial contd to 11-10-76				
11-10-76	Before Platt, J.- Case Called. Deft. & Counsel present. Trial resumed. Deft!s. Motion renewed for authorized transcript and to produce informant - denied. Deft's motion to dismiss - denied. Trial continued to 11-11-76 at 10:00 A.M.				
11-11-76	Before Platt, J.- Case Called. Deft. & Counsel present. Trial resumed. Deft's motion to take witnesses out of order - granted. Trial continued to 11-15-76 at 10:00 A.M.				
11-15-76	Before Platt, J.- Case Called. Deft & Counsel present. Trial resumed. Deft. rests. Continued to 11-16-76 at 9:30 A.M.				
11-16-76	Before Platt, J - case called - deft & atty present - trial resumed - Hearing on Govts offer ordered and begun - hearing concluded - defts motion pursuant to Rule 29 for Judgment of acquittal - denied . trial contd to 11-17-76				
11/17/76	Before PLATT, J .- Case called. Deft & Counsel present. Trial resumed. Judge charges jury. Jury retires for deliberations. Jury returns with a verdict of guilty on cts 1 and 2. Jury is excused until 11/18/76 at 9:30 a.m. for futher deliberations. Govts motion to increase bail for deft to $50,000 - denied. Deft reserves motions. Trial continued to 11/18/76 at 9:30 a.m.				
11/18/76	Before PLATT, J.- Case called. Jury returns from deliberations. Trial concluded, jury discharged.				
11/19/76	Stenographers transcript dated 11/8/76, 11/9/76, 11/10/76, 11/11/76, and 11/15/76 filed.				
1-13-77	Before Platt, J - case called - deft & counsel Louis LOMMA present - F.Arona sworn as interpreter - defts motion for judgment of acquittal and for a new trial - both denied - deft sentenced on each of counts 1 and 3 to imprisonment for a term of 3 years under 18:4205(b)(2) sentences to run				

FINE AND/OR RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

76 CR 608 U.S.A. vs. Pasquale Piccirillo

CRIMINAL DOCKET No. 6

DATE	PROCEEDINGS
	concurrently - deft sentenced to pay a fine of $1,000 on each of counts 1 and 2 for a total fine of $2,000. Execution of sentence is stayed pending appeal - fine is to be paid within 90 days. Bail contd. Clerk to file Notice of appeal
1-13-77	Judgment and commitment filed - certified copies to Marshal
1/18/77	Notice of appeal filed.
1/18/77	Docket entries and duplicate of Notice of Appeal mailed to the C of A.
2.1.77	Order filed received from the Court of Appeals that the record be filed on or before 2.28.77.
2.1.77	Order filed received from the Court of Appeals that the record be filed on or before 2.28.77, in default of which the appeal shall be dismissed forthwith.
2-18-77	Voucher for compensation for expert services filed (M,Miele) and forwarded to Chief Auditor, Washington, DC. for payment
2-28-77	Two transcripts filed (one dated Nov. 16 and one Nov.17, 1976)
3-9-77	Transcript filed dated Nov. 18, 1976
3/17/77	Voucher for compensation for expdrt services filed and forwarded to Washington for payment.

PROCEEDINGS

THE COURT: All right, bring in the jury.

(Time noted 9:40 A.M.)

THE COURT: Ladies and gentlemen, I going to give you instructions on the law in this case. Unfortunately for you it is my practice to read the instructions. I realize that makes it more difficult for you to follow them than if I gave them to you extraneously but this way we minimize the risk of error and so while it does make it a problem for you to follow than if If just give to you off the top of my head. If my voice falls and any of you have any difficulty hearing me, let me know in some fashion because I want you to hear all of the instructions.

Generally speaking, the instructions fall into four parts. I begin with some general instructions and then I proceed to a discussion of the indictment and the statutes involved and the elements of the crimes charged and their various contentions. Then I go back to some additional general instructions and then, lastly, I give you some instructions on how you should conduct yourselves as jurors when you retire from your deliberations. I give you that brief outline so you may be

able to grasp when I sort of shift gears from one area to another and make it easier for you to follow.

It is my duty to give the instructions of the Court as to the law applicable to this case. It is your duty as jurors to follow the law as stated in the instructions of the Court and to apply the rules of law so given to the facts and you find them from the evidence in the case.

You are not to single out one instructions alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court, just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case. You must not permit yourselves to be governed by sympathy, bias, prejudice or any other considerations not founded on evidence and these instructions on the law.

Justice through trial by jury must always depend upon the willingness of each such

individual juror to seek the truth as to the facts from the same evidence presented to all the jurors and to arrive at a verdict by applying the same rules of law as given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the "Not guilty"pleas of the accused. You are to perform this duty without bias or prejudice as to any party. Again, the law does not permit jurors to be governed by sympathy, perjudice or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court and reach a just verdict regardless of the consequences.

I am sending the exhibits which have been received in evidence and a copy of the indictment with you as you retire for your deliberations, with one possible exception. I may, for example, not send the bullets with the guns. I do that not because I think you will get mad at one another and be tempted to use one or more of the same but just out of caution. With respect to it, I will pause

right here and talk briefly about any requests to have any testimony read back. Generally speaking, you should view and consider the testimony that you have heard as a whole, just as you should listen to and follow the instructions on the law which I am giving you, as a whole. You jurors, if you reach some sort of an impasse and must have a portion of some witness' testimony read back, you may so request it. However, I caution you that when you do that, probably and in all probability, you are probably going to highlight that portion which you heard most recently in your minds and you may not be able to view all of the testimony objectively as a whole thereafter. So, keep that in mind when you make such requests. Try at least in the first instance and give in a reasonable try as far as time is concerned to do without read-backs of portions of testimony. You have heard it and you should be able to remember it. It hasn't been that long of a case.

An indictment is but a form or method of accusing a defendant of a crime. It is not evidence of any kind against the accused.

There are two types of evidence from which a jury may properly find a defendant guilty of a crime. One is direct evidence, such as the

testimony of an eyewitness and the other is circumstantial evidence, the proof of facts and circumstances which rationally imply the existence or nonexistence of other facts because such other facts usually follow according to the common experience of mankind.

Thus by way of example, the foot print of a man in the sand implied to Robinson Caruso that there was another man with him on the desert island and indeed there was; the man Friday. Thus, on the one hand you may have direct evidence of the issue and on the other hand you may have circumstantial evidence of the issue. The law does not hold that one type of evidence is of a better quality than the other. The law requires only that the Government prove its case beyond a reasonable doubt both on the direct and circumstantial evidence. At times, the jury might feel that circumstantial evidence is of better quality. At other times they may feel direct evidence is of better quality. That judgment is left entirely to you.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury must be satisfied of the

defendant's guilt beyond a reasonable doubt from all of the evidence in the case.

The law presumes the defendants to be innocent of crime. Thus, a defendant, although accused, begins the trial with a clean slate, with no evidence against him and the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonble doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Now, reasonable doubt does not mean a doubt arbitrarily and copiously asserted by a juror because of his or her reluctance to perform an unpleasant task. It does not mean a doubt arising from a natural sympathy which we all have for others. It is not necessary for the Government to prove the

guilt of the defendant beyond all possible doubt. Because if that were the rule, very few people would ever be convicted. It is practically impossible for a person to be absolutely sure and convinced of any controverted fact which by its nature is not susceptible of mathematical certainty. In consequence, the law says that a doubt should be reasonable doubt, not a possible doubt.

A reasonable doubt is a doubt based upon reason and common sense, the kind of doubt that would make a resonable person hesitate to act. Proof beyond a reasonable doubt must therefore be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture. Again, a reasonable doubt means a doubt sufficient to cause a prudent person to hesitate to act in the most important affairs of his or her life. The requirement of proof beyond a reasonable doubt operates on the whole case and not on the separate bits of evidence and not on the separate bits of evidence. Each individual item of evidence need not be proven beyond a reasonable doubt.

Now, it is charged in Count One of the indictment that on or about and between the 13th day of May, 1975 and the 3rd day of September, 1976, both dates being approximate and inclusive, within the Eastern District of New York, the defendants Pasquale Piccirillo, Maria Piccirillo and Carmine Mercogliano did knowingly and unlawfully engage in the business of dealing in fire arms and ammunition. The defendants Pasquale Piccirillo, Maria Piccirillo and Carmine Mercogliano, not being licensed to engage in commerce of fire arms under Title 18, United States Code, Section 923 and during the commission of this offense, the above-named defendants were aided and abetted by Dominick Linarillo, a Federally licensed gun dealer, all in violation of Title 18, United States Code, Section 922A1, 923, 924 and Section 2 of Title 18.

Section 922A1 of Title 18, of the United States Code provides in pertinent part that it shall be unlawful for any person except a licensed dealer to engage in the business of dealing in fire arms or ammunition.

Section 923 of Title 18, of the United States Code provides that no person shall engage in business as a fire arms or ammunition dealer until

he has filed an application with andreceived a license to do so from the Secretary of the Treasury or his delegate.

Section 924 of such title provides for the punishment of one who violates the aforegoing sections and as I will indicate to you later, the punishment, if any, of the defendants is of no concern of yours, that being a matter left entirely up to the Court.

Section 2 of Title 18 of the United States Code provides in pertinent part that whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishment as a principal and whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The following are the essential elements of the crime charged which must be proven beyond a reasonable doubt:

One, that the defendants were engaging in the business of dealing in fire arms or ammunition;

Two, that they engaged in such business knowingly; and

Three, that they engaged in such business without having filed an application with and received a license to do so from the Secretary of the Treasury or his delegate.

Mr. and Mrs. Piccirillo and Mr. Mercogliano have stipulated that they did not have such a federal license.

An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word "Knowingly" was to insure that no one would be convicted for an act done because of mistake, or accident, or other innocent reason.

The term "Fire arm" as used in these sections of the Code and in this count of the indictment means any weapon which will or is designed to or may readily be converted to expell a projectile by the action of an explosive; the frame or receiver of any such weapon; any fire arm or fire arm silencer; or any destructive device. Such term does not include an antic fire arm.

The term "Destructive device" means any type of weapon, other than a shot gun or a shot gun shell which the Secretary finds is generally recognized as particularly suitable for sporting

purposes, by whatever name known which will, or which may be readily converted to expell a projectile by the action of an explosive or other propellant and which has any barrel with a bore of more than one half inch in diameter.

The term "Dealer" means any person engaged in the business of selling fire arms or ammunition at wholesale or retail; any person engaged in the business of repairing fire arms or of making or fitting special barrels, stocks, or trigger mechanisms to fire arms, or any person who is a pawnbroker.

The term "Ammunition" means ammunition or cartridge cases, primers, bullets, or propellant powder design for use in any fire arm.

For purposes of this section, dealing in fire arms and ammunition need not be a defendant's primary business and he or she need not make any certain amount of profit from it. A business is that which occupies time, attention and labor for the purpose of livelihood or profit.

While the Government need not prove an actual profit from sales of fire arms, it must show a willingness, a profit motive and a greater degree of activity than an occasional sale by a

hobbiest. Again, the essential question is, has the Government proven beyond a reasonable doubt that the defendants had a willingness to deal in fire arms and acted in a greater degree of activity than the occasional sales as a hobbiest.

Count one charges that the defendants Pasquale Piccirillo, Maria Piccirillo and Carmine Mercogliano knowingly and unlawfully were engaged in the business of dealing in fire arms and ammunition without a Federal license. In this count, the Government must prove that they were knowingly, i.e. voluntarily, engaged in such a business. It need not prove that those defendants knew that their acts were in violation of Federal law or the defendants knew of the existence of the law at all. Congress did not make ignorance of the law a defense for unlicensed dealing in fire arms.

It is charged in Count Two of the indictment that on or about the 27th day of July, 1976, within the Eastern District of New York, the defendants Dominick Linarillo and Pasquale Piccirillo did knowingly and unlawfully transfer a fire arm as defined in Title 26 of the United States Code, Section 5845A and B, to wit, one single barrel 12 guage G.C. Higgins Shotgun Model 583100 containing

any serial number having a barrel length of approximately 11 inches and overall length of approximately 27 and a half inches, said sawed off shotgun having been registered to the defendants Dominick Linarillo and Pasquale Piccirillo in the United States transfer records, all in violation of Title 26 United States Code 5861E and 5871 and Section 2 of Title 18, the aiding and abetting section.

Now, Sections 5841 and 5861E of Title 26 provide in pertinent part that it shall be unlawful for any person to transfer a fire arm which is not registered to him in the National Fire Arms Registration and Transfer Record.

Section 5871 of such title provides in pertinent part that any person who violates or fails to comply with any provision of this Chapter shall be punished.

Section 5845A provides that the term "Fire arm" means a shotgun having a barrel or barrels of less than 18 inches in length.

Section 5845B provides that the term shotgun means a weapon designed or redesigned made or remade and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell

to fire through a smooth bore either a number of projectiles or a single projectile for each pull of the trigger and shall include any such weapon which may be readily restored to fire a fixed shotgun shell.

The essential elements of the crime charged which must be proven beyond a reasonable doubt with respect to this count are as follows: The the defendants at the time and place alleged transferred a fire arm, to wit, a shotgun having a barrel length of approximately 11 inches and an overall length of approximately 27 and a half inches in length, as charged;

Two, that such transfer was knowingly made;

Three, that the fire arm or shotgun was not registered to the defendants in a National Fire Arms Registration and Transfer Record.

Now, I read to you moments ago Section 2 of Title 18 which is the so-called aiding and abetting section and I will repeat it: Whoever commits an offense against the United States or aids, abets, counsels, commands, induces and procures its commission is punishable as a principal. Whoever willfully causes an act to be done which if directly

performed by him or another would be an offense against the United States is punishable as a principal.

That Section 2, as I have indicated, is applicable to both Count One and Count Two.

Now, I have a brief discussion about the section with you.

The guilt of a defendant may be established without proof that the accused personally did every act constituting the offense charged. In other words, every person willfully participates in the commission of a crime may be found guilty of that offense. Participation is willful if done voluntarily and intentionally and with a specific intent to do something the law forbids, or with a specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

In order to aid and abet another to commit a crime it is necessary that the accused willfully associate himself in some way with the criminal venture and willfully participate in it as he would in something he wishes to bring about; that is to say, that he willfully seek by some act or omission of his to make the criminal venture

succeed.

An act or omission is willfully done if done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

You of course may not find the defendants guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons and that the defendant participated in its commission.

Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

It is charged in Count Three of the indictment that on or about and between the 5th day of April, 1976 and the 3rd day of September, 1976, both dates being approximate and inclusive, within the Eastern District of New York, the defendants Dominick Linarillo, a federally licensed gun dealer,

knowingly and unlawfully did fail to make appropriate and proper maintenance records which he is required to keep pursuant to Title 18, United States Code 923 and the rules and regulations promulgated thereunder, all in violation of Title 18, United States Code, Section 922M and Section 923G of Title 18.

Section 922M of Title 18 of the United States Code provides in pertinent part that it shall be unlawful for any licensed dealer or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain any record which he is required to keep pursuant to Section 923 of this Chapter or regulations promulgated thereunder.

Section 923G of Title 18 of the United States Code provides in pertinent part that each licensed dealer or licensed collector shall maintain such records of importation, production, shipment, receipt, sale, or other disposition of fire arms and ammunition at such place, for such period, and in such form as the Secretary may by regulations prescribed. Such dealers and collectors shall make such records available for inspection at all reasonable times and shall submit to the Secretary such

reports and information with respect to such records and the contents thereof as he shall be regulations prescribed.

The Secretary of the Treasury promulgated the following regulations:

Section 178.121

A. The records pertaining to fire arm transactions prescribed by this part shall be in permanent form and shall be retained on licensed premises by the manner described in the sub part. Records maintained thereto shall remain at the licensed importer in the manner prescribed by Section 178.125.

Section 178.124A provides that a licensed importer, licensed manufacturer or licensed dealer shall not sell or otherwise dispose temporarily or permanently of any fire arm, such as to another licensee or license collector, shall not sell or otherwise dispose of any curio or relic other than to another licensee, unless he requires Firearms Transaction Form 4473.

Section 1758.125

E. Provides that each licensed dealer and each licensed collector shall on effective date of this part enter into a permanent record each

receipt for distribution firearms, curios or relics. In addition, before commencing the continuing firearms business, each licensed dealer and licensed collector shall inventory the firearms or collection and shall record same in the record required by this paragraph.

Now, the little references both in the statutes and during the course of the case to what a frame of references and it is defined in the regulations as that part of a firearm that provides housing, a hammer, breech or bolt and firing mechanism and usually is threaded at its forward position to receive its barrel.

The following are the essential elements of the crime charged which must be proven beyond a reasonable doubt:

One, that the defendant was a licensed gun dealer;

Two, that the defendant failed to make appropriate entries and properly maintain records which he was required to keep as charged;

Three, that the defendant knowingly failed to do so.

Now, the defendants, Pasquale and Maria Piccirillo assert that they were victims of

entrapment as to the events charged in the indictment.

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, they are victims of entrapment and the law as a matter of policy forbids their conviction in such a case. On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that the Government agents provide what appears to be a favorable opportunity is not entrapment. For example, when the Government suspects that a person is engaged in the alleged sale of firearms, it is not entrapment for a Government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase firearms from the suspected person.

(Continued on next page.)

Charge

If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the said defendants were ready and willing to commit crimes such as charged in the indictment, whenever opportunity was afforded, and that Government officers or their agents did no more than offer the opportunity, then the jury should find that the said defendants were not a victim of entrapment.

On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the said defendants had the previous intent or purpose to commit an offense of the character charged, apart from the inducment or persuasion of some officer or agent of the Government, then it is your duty to find them not guilty.

Two questions of fact arise:

One, did the agent or informer induce the accused to commit the offense charged in the indictment;

Two, if so, were the accused ready and willing without persuasion and were they awaiting any propitious opportunity to commit the offense.

On the first question namely, whether the agents induced the accused to commit the offense, the accused has the burden of proof. Such burden in showing inducement is relatively slight.

On the second question, namely, the predisposition of the accused to commit the crime, the prosecution has the burden of proving the same beyond a reasonable doubt.

Now, the defendant Linarillo denies ever having made any sales of the firearms to the defendant Piccirillo or to Agent Pita and maintains all his sales and entries were in accordance with the law. The defendant Mercogliano denies participating in this sale of a firearm that is said to have taken place in his business office and denies negotiating units or telling the agents that he made sales to others.

It is for you to determine whether the agents or the defendants in each instance is telling the truth, bearing in mind of course that the Government must prove its essential elements of each of the offenses against each defendant beyond a reasonable doubt, as I have heretofore indicated to you.

Now, with respect to the question of knowledge, knowledge and intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind but you may infer a defendant's knowledge and intent from the surrounding circumstances. You may consider any statement made and done or omitted by a defendant and all of the facts and circumstances in evidence which indicate his or her state of mind.

Now, there are certain statements that you may recall were made during the course of this trial by the Government agents and perhaps one or two others where there were arguments as to whether or not they were hearsay or whether they should have been admissible.

For example, the Government agents testified that the defendant Pasquale Piccirillo described to them certain acts which he alleged had been done by the defendant Linarillo. My recollection is, and I caution you that it is your recollection not my recollection which controls, that, for example, one or more of the descriptions of acts by Mr. Linarillo was given following Mr.

Piccirillo's alleged trips alone into the Fulton Gun Shop and his re-emergence therefrom with certain of the guns which were received in evidence, namely, Exhibits 3, 4, 7, 8, 9 and 10. Now, ordinarily, this testimony by the Government agents with respect to the acts of Mr. Linarillo would not be admissible against Mr. Linarillo since the descriptions are hearsay, not having been made by Mr. Piccirillo in the presence of Mr. Linarillo and the acts themselves were not commited in the presence of the Government witness or agent who testified.

However, you may in any event consider the descriptions against the defendant Piccirillo and you may also consider the descriptions against the defendant Linarillo on Count One if and only if you find beyond a reasonable doubt that at the time the acts so described were allegedly committed, the defendant Linarillo was an aider or abettor, i.e., an active participant with the defendants Piccirillos in their alleged business as firearm or ammunition dealers without a license; otherwise, you must disregard such hearsay descriptions and the acts themselves entirely as against said defendant Linarillo.

Similarly with respect to the guns which Mr. Piccirillo allegedly brought out of the gun shop by himself, namely Exhibits 3, 4, 7, 8, 9 and 10, while they may be considered in any event as evidence against Mr. Piccirillo, again they may only be received as evidence against defendant Linarillo if you find beyond a reasonable doubt that at the time they were allegedly acquired, the defendant Linarillo was an aider or abettor, i.e., an active participant with the Piccirillo's in their alleged business as firearm and ammunition dealers without a license; otherwise, you must disregard such guns entirely as against said defendant Linarillo.

Now with respect to Exhibit 11, that is the P38 revolver which Agent Pita said he purchased from the defendant Linarillo on July 27, 1976, along with the sawed off shotgun, Exhibit 12, there is no charge against the defendant Linarillo in Counts One, Two, or Three that he sold such a revolver. Count One contains the charges of engaging in business as firearm and ammunition dealers against the defendants Piccirillo's and Mercogliano and Count Two only charges the defendants

Piccirillo and Linarillo with unlawfully selling the sawed off shotgun. However, as I told you during the trial, the alleged sale of the revolver may, if you find beyond a reasonable doubt, that the same was unlawfully sold by the defendants Linarillo and Piccirillo on said date, be used for limited purposes and limited purposes only, namely to prove knowledge, intent, identity, common scheme or plan or absence of mistake or accident or other innocent reason on the part of the defendants Piccirillo and Linarillo in the acts charged against them in the counts of the indictment against them subject to the following limitations:

The fact that an accused may have commited another offense at some time is not any evidence or proof whatever that, at an earlier time, the accused committed the offense charged in the indictment, even though both offenses are of a like nature. Evidence through an alleged earlier simultaneous or later offense of a like nature may not therefore be considered by the jury in determining whether the accused did the act charged in the indictment. Nor may such evidence be considered for any other purpose whatever, unless the jury first

find that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the act charged in the indictment, leaving aside only the question of whether the accused did it knowingly, intentionally and willfully, or that it was a part of a common scheme and plan and not because of accident, mistake or other innocent reason.

If the jury should find beyond a reasonable doubt from the other evidence in the case that the accused did the act or acts charged in the indictment, then the jury may consider evidence as to an alleged earlier simultaneous or later offense, i.e., in this case, the sale of the P38 revolver. I should say alleged sale of the P38 revolver or in like nature. In determining motive, the state of mind, knowledge or intent, identity, whether it was a common scheme or plan or such with which the accused did the act charged in the indictment and where all the elements of an alleged earlier or later offense of a like nature are established by the evidence which is clear and conclusive, the jury may, but is not obliged to, draw the inference and find that in doing the act charged in the indictment,

the accused acted willfully, knowingly and with specific intent and not because of mistake or accident or other innocent reason.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them and all facts which may have been admitted or stipulated and all facts and events which may have been judicially noticed and all applicable presumptions stated in these instructions.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court must be entirely disregarded. Evidence does include however what is brought out from the witnesses on cross-

examination as well as what is testified to on direct examination. Unless you are otherwise instructed, anything you may have seen or heard outside the Courtroom is not evidence and must be entirely disregarded. You are to consider only the evidence in the case and your verdict is to be based on the evidence only. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in the light of experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

If a lawyer asks a witness a question which contains an assertion of fact, you may not consider the assertion as evidence of that fact. The lawyers' statements are not evidence.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight

their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind and demeanor and the manner while on the stand. Consider the witness' ability to observe the matters as to which he or she has testified and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently an innocent misrecollection, like failure of recollection, is not

an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy results from innocent error or intention falsehood. After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

Now, there are several of persons those names you have heard during the course of the trial, at least certainly one, possibly others, and one or more of the attorneys may have referred to their absence from this trial. Neither of the defendants, nor the Government may benefit from the absence of such witnesses or possible witnesses because each side has an equal opportunity, or lack of opportunity to have them testify. If either side had wanted any of them here, so far as the record shows, they had an equal opportunity to get them and absence should not affect your judgment in passing on this case or in determining the guilt or innocence of the defendants.

Bear in mind, of course, that the law never imposes upon the defendant in a criminal

case the burden of producing orcalling any witness or producing any evidence.

The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of the statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars and you may reject all of the testimony of that witness or give it such credibility as you think it deserves.

A defendant who wishes to testify, however, is a competent witness and the defendant's testimony is to be judged in the same way as that of any other witness.

The law permits a defendant, at his own request to testify on his own behalf. The testimony of an individual defendant is before you.

You must determine how far it is credible. The personal interest which every defendant has in the result of his case should be considered in determining the credibility of his testimony. You are instructed that interest creates a motive for false testimony, that the greater the interest the stronger is the temptation, and that the interest of a defendant is of a character possessed by no other witness and is, therefore, a matter which may seriously affect the credence that should be given to his testimony.

Now, there has been testimony here to the previous good character of the defendant Mercogliano. You should consider such evidence of character together with all the other facts with respect to the guilt or innocence of the defendant. Evidence of good character may in itself create a reasonable doubt where without such evidence no reasonable doubt would have existed. But, if on all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty, a showing that he had previously enjoyed a reputation of good character, does not justify or excuse the offense and you should not acquit a defendant merely because

you believe he is a person of good repute.

The testimony of a character witness is not to be regarded by you as expressing the witness' personal opinion of the defendant's character, nor is it to be taken by you as the witness' opinion as to the guilt or innocence of the defendant. The guilt or innocence of the defendant is for you and you alone to determine.

It is the duty of the attorneys on each side of a case to object when the other side offers testimony or evidence which the attorney believes is not properly admissible. You should not show prejudice against an attorney or his client because the attorney has made objections.

Upon allowing the testimony or other evidence to be introduced over the objection of an attorney, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

When the Court has sustained an objection to a question addressed to the witness,

the jury must disregard the question entirely and may draw no inference from the wording of it, or speculate as to what the witness would have said if he had been permitted to answer any question.

The fact that the Court has asked one or more questions of a witness for clarification or for admissibility of evidence purposes is not to be taken by you in any way as indicating that the Court has any opinion as to the guilt or innocence of the defendant in this case and you are to draw no such inference therefrom. That determination is for you and you alone based on all of the facts in this case and the applicable law in these instructions.

You are here to determine the guilt or innocence of the accused from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the accused, you should so find, even though you may believe one or more other persons are guilty. But if any reasonable doubt remains in your minds after impartial consideration of all the evidence in the case, it is your duty to find the accused

not guilty.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is, however, your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself but to do so only after an impartial consideration of the evidence of the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans. You are judges, judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

There is nothing particularly different in the way a jury should consider the

evidence in a criminal case from that in which all reasonable persons treat any question, depending upon evidence presented to them. You are expected to use your good sense, consider the evidence in the case for only those purposes for which it has been admitted and give it a reasonable and fair consideration, in the light of your own common knowledge of the natural tendencies and inclinations of human beings.

If the accused be proved guilty beyond reasonable doubt say so. If not so proved guilty, say so. You must render a verdict with respect to each of the defendants named in each of the counts. Thus, under Count One you must render a verdict with each of the four named defendants. You must render a separate verdict with respect to each of the defendants. Count Three, you have only Dominick Linarillo as the defendant.

If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

As I told you before, the punishment provided by law for the offense charged in the

indictment is a matter exclusively within the province of the Court and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

Upon retiring to the jury room, Juror No. 1 will answer as your foreman, that is the gentleman seated closest to me in the blue suit, unless he elects not to do so. If he chooses not to do so, you elect a foreman amongst your number. The foreman will be the spokesman here in Court.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note via one of the Deputy Marshals who will be stationed outside your door, signed by the Foreman or one or more members of the jury. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing and the Court will never communicate with any member of the jury on any subject touching on the merits of the case, otherwise than in writing, or orally here in open Court.

You will note from the oath to be administered by the Clerk of the Court to the Marshals that they too, as well as all other persons

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are forbidden to communicate in any way or manner with a member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person, not even to the Court, how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused, until after you have reached a unanimous verdict.

If you are to send me a note which says that the jury stands thus and so for conviction or thus and so for acquittal, the chances are I would have to declare a mistrial, reimpanel a new jury and go through another week's trial. One jury did that to me even though I instructed them and after I instructed them. Don't do that. It means just a waste of time. If and when you reach a verdict, you should write me a note stating we have reached a unanimous verdict. Don't tell me what the verdict is. We will announce it in open Court and, I hope this is not so, if you reach an impasse and you have not been able to reach a verdict, you can send me a note saying that you have reached an impasse and can render no verdict. Don't tell me how you stand.

Those are the instructions of the

Court. I will take a few minutes to discuss them with the attorneys. I will recall you and the alternates will be discharged. The remainder of you will consider the case during the five or ten minute recess, I will give you, don't discuss any aspect of the case or anything that has gone on today. Thankyou.

(Thereby, the jury was excused at the time noted 1:30 A.M.)

THE COURT: Mr. Nims is giving me a 1977 calendar with the dates so small that even with my good glasses I couldn't see them.

MR. APPLEBY: I have no objections to your Honor's charge.

THE COURT: Any additional requests?

MR. APPLEBY: No additional requests.

THE COURT: Mr. Lefkowitz?

MR. LEFKOWITZ: Your Honor, your Honor stated -- I don't know if I have each word correct but it sounded to me like "Each piece of evidence need not be proven beyond a reasonable doubt" I may be mistaken about the wording "Piece" but that is the substance of what I believe I heard your Honor say. I would, with respect --

THE COURT: Each item of evidence.

MR. LEFKOWITZ: I would respectfully take objection to that, your Honor, not because the statement itself is wrong or prejudicial, but I take objection toit because we are dealing here with a group of jurors who are not uniquely different from any other jurors except voir dire produced that about nine of them, in any event, have never served on a jury before and there have been numerous items of evidence introduced, as is usually the case, and your Honor did give them instructions during the course of the trial that the introduction of a piece of evidence does not mean that that is the proof of the case in fact, and in that sense, this language that your Honor used is consonant with that but I think your Honor, that when you went on subsequently to stress, correctly and properly, that each element of a crime must be proven beyond a reasonable doubt, it is my humble opinion that the jurors can be mistaken and when they heard your Honor, for whom they have a great deal of respect, asyou saw how they sat up and listened to you, with their attention focused upon you, when you hear them say each individual piece of evidence need not be proven beyond a reasonable doubt, I suggest that might

tend to confuse them.

THE COURT: I respect your opinion. I think it's the law and as long as it is separated, apart from each element of the crime, which I repeated on three separate occasions, I think I said each article was proven beyond a reasonable doubt -- As long as it is kept separate, I don't think it will confuse them. I think it's the law and I think the Govenment is entitled to it.

MR. LEFKOWITZ: I made my objection.

THE COURT: I respect your opinion. I think it's a point not well taken but a point ardently taken.

MR. APPLEBY: There is one request. I believe when you mentioned character evidence, you only related to Carmine Mercogliano. I believe Maria and Pasquale Piccirillo did introduce character testimony.

THE COURT: I will correct that.

MR. SOMMA: That takes care of that.

THE COURT: You can sit down until he is finished.

MR. SOMMA: In fairness to my client, Maria and Pasquale Piccirillo, it was stated in the testimony that Mr. Piccirillo -- Application was

made by me several times -- All right it was premature, as the Court stated, but the Government made no effort to produce this witness, only on the last day, as we have. Yesterday, the Government put a witness on the stand, put an investigator on the stand and the investigator made a statement that he made an attempt to get this witness in. The Government --

THE COURT: Has control. You have shown me nothing to so indicate it.

MR. SOMMA: We had this Special Agent Cole who testified yesterday that he was at the premises --

THE COURT: Not to keep control. You stood and tried to get in and I didn't --

MR. SOMMA: I said the witness Frank Sagliosa was under the control of the Government.

THE COURT: What proof have you got of that? The U.S. Attorney denies it. They put a witness on the stand that indicated --

MR. SOMMA: The U.S. Attorney repeated, he is not going to bring in Frank Sagliosa. He gave me his name and address.

THE COURT: That's all he knows. I don't follow your logic. You said he has control. I don't see it.

MR. SOMMA: Ten days before this trial, a check was given to Frank Sagliosa as full payment of his undercover operations, as an informer, as a paid informer. At that time the Government --

THE COURT: Was an independent contractor. That doesn't mean that was payment for something he has done for me, that I have it doesn't mean I have control over him.

MR. SOMMA: When the check was issued, a subpoena could have been.

THE COURT: No request was made right there and then. You made your request on the first day of trial. They went out and looked for him on the same day you did.

MR. SOMMA: Within 24 hours after I was retained, I informed the U.S. Attorney Appleby that I was going to resort to the defense of entrapment and I was interested in the confidential informer. He took the position he didn't need him. It's only when I cited three important cases that is attached to the memorandum of law that I submitted yesterday to this Court, it's only when Mr. Appleby realized that he would be defeated if he didn't make some pro forma attempt to bring in the informer, that he decided he needed yesterday

morning, to do something about it, or should I say the other night.

THE COURT: I don't think your case stands on the proposition that you state. These facts are not the case and we know no case.

MR. SOMMA: We have the case. Row has the case.

(Continued on next page.)

BY MR. SOMMA: In order to come under the exception, Mr. Appleby made a pro forma attempt to show the unavailability of Mr. Frank Salutto but in that particular exception, I want to note that I believe it's United States versus Sotto (phonetic) the informant died and therefore the Government could not bring in the informer.

THE COURT: And they don't know where he is.

MR. SOMMA: Furthermore, the United States Attorney did not produce any evidence to substitute for the evidence of Frank Salutto, so in order to come within the exception --

THE COURT: Of course they did. They had an agent; Agent Pita, and what's his name?

MR. APPLEBY: Sazema.

MR. SOMMA: But specifically, in Gomez Rojas, it specifically states that in order to come under the exception, you see, not to provide the informant, the informer must be brought in by the Government.

THE COURT: It must not be brought in by the Government, not when he is not available and two, where there is other evidence.

MR. SOMMA: His statement, he will not bring him in and then all of a sudden, he has a reversal

because he realizes the law is against him.

THE COURT: That may not be the reason at all.

MR. APPLEBY: I never said I would not bring him in.

THE COURT: He said he wouldn't call him as a witness. He may have wanted to call him as a witness in order to contradict.

MR. SOMMA: He said I will only use him unless he walks through that door.

THE COURT: Don't argue. What's your point? We have been over this three times.

MR. SOMMA: When did he look for him?

THE COURT: We are not here to argue this point of law.

MR. SOMMA: I respectfully request that the Court charge a CI should have been provided by the U.S. Attorney and its failure to do so could be taken by the jury that he would have adversely testified to the Government and favorably for the defendants Pasquale Piccirillo and Maria Piccirillo.

THE COURT: Denied.

MR. SOMMA: I except to that, your Honor.

THE COURT: You don't have to.

THE INTERPRETER: May I be excused to go to the rest room?

MR. BERNARD: Your Honor, I would propose that the Court give the jury the following admonition and instruction: In my charge, I stated to you that Carmine Mercogliano denies having told the agent that he had sold firearms to others in the past. That was an error on my part. What I meant to say is this: Carmine Mercogliano does not deny having told the agents that he had sold firearms to others in the past but he does now deny the truth of those statements. For example, he admits having told the agents that he had sold a machine gun. My application is, well -- I object to the Court's statement to the jury with respect to my client's position --

THE COURT: I am sorry. Maybe I misunderstood. I thought he denied it.

MR. APPLEBY: My recollection is the same as your Honor's. I asked Mr. Mercogliano on cross-examination, did you tell the agents that you had sold 75 guns in the past and my recollection is, No. He never said that.

THE COURT: It's easy enough to check it. I was taking a position what I thought was most favorable to your client.

MR. BERNARD: He denies the truth of those statements.

MR. APPLEBY: It was the last bit about cross-examination.

MR. BERNARD: I think his response was having denied that.

MR. APPLEBY: That he had sold 75 guns to some other individual?

MR. BERNARD: He denies that particular. He admits that, "Yes, I had a machine gun but I sold it."

THE COURT: I am asking you, Mr. Bernard, do you want that charge? I will give it to you but my question is whether you want it.

MR. BERNARD: Yes. I sure do.

THE COURT: In part, it was an error. It was an error on my part. What I meant to say was this:

MR. APPLEBY: I don't think that's accurate. I think Mr. Bernard is saying that Carmine Mercogliano denies having told the agent that he sold 75 guns to some other individuals. However, he does admit selling a machine gun. That's basically what you are saying.

MR. BERNARD: You are not reading it accurately. Come on. He does not deny having told the agent.

THE COURT: He does not deny the truth of the statement, except admits having told the agent that he had sold a machine gun.

MR. SOMMA: My client, Maria wants to go to the ladies' room.

THE COURT: Okay.

What did he admit on cross-examination?

MR. BERNARD: He admits that he had told the agent that he --

MR. APPLEBY: He denied ever saying to the agent that he sold 75 guns. That's a denial. He says the agents lied about that.

MR. BERNARD: And he admitted telling the agent that he had sold a machine gun.

THE COURT: He did not deny that he had told the agent that he sold a machine gun to others?

MR. BERNARD: That's right.

THE COURT: But he does deny the truth of that statement; machine gun, not firearms?

MR. BERNARD: Anything you want to say.

MR. APPLEBY: This charge is only about machine guns. I think to be fair to the Government, I think you should include that he denies the statement that he sold 75 guns. Why should he only deny the machine gun.

THE COURT: All right. Mr. Mercogliano denied, however, having sold firearms to others. 75?

MR. APPLEBY: 75 guns.

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MR. BERNARD: Let's take a look at the cross-examination. He admits -- You know what his position is. His position is --

THE COURT: I'll give it if you want it but it's up to you.

MR. APPLEBY: I know what happened your Honor. Yesterday that --

MR. BERNARD: I don't recall that. If I didn't cure it on redirect, I should have.

THE COURT: He denied it all?

MR. BERNARD: No, he admits he did a lot of things.

MR. APPLEBY: There is the 16th I am talking about.

THE COURT: I think, Mr. Bernard and I agree that he did deny --

MR. BERNARD: I don't absolutely remember.

THE COURT: -- It is my recollection in my charge that I stated to you that Carmine Mercogliano denies having told the agent that he sold firearms to others in the past. That was in part an error on my part. What I should have said was this: Carmine Mercogliano does not deny having told the agent that he had sold a machine gun to another in the past but he does now deny the truth of the

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statement. It is my recollection, and it is your recollection that controls, that Mr. Mercogliano denies having told the agents that he sold 75 guns to others and he has persisted in such denial on the witness stand.

MR. BERNARD: I don't recall that.

MR. APPLEBY: Your Honor, I specifically recall that. I made a point of it.

THE COURT: My recollection is -- I thought he denied the whole thing. He says he agrees with you on the first part.

MR. BERNARD: Let's see if we can agree on this. The preamble perfectly remains and Mr. Mercogliano admits to statements that he sold firearms to others in the past and persist in his denial of others, okay?

MR. APPLEBY: I think that's confusing.

MR. BERNARD: Put it in abstract instead of specifics. Since you are the only people who recall the 75 guns --

THE COURT: That's why I charged it that way. I was surprised that you pointed out that he admitted telling the agent that he sold the machine gun. I thought he denied telling the agent he sold anything.

MR. BERNARD: The agent wanted a machine gun

and the agent called him about about 19 times and, well I had one but I sold it.

THE COURT: I'll give them or nothing.

MR. BERNARD: Let me see what he thinks.

THE COURT: Otherwise it will be confusing.

MR. BERNARD: He agrees with me that he certainly did in his testimony say that, "Yes, I told the officer that I sold guns to people but I never had." He admits saying that but he denies the truth of it.

MR. APPLEBY: When I went up for cross-examination --

THE COURT: Mr. Reporter, do you have your notes with you?

THE COURT REPORTER: No, your Honor.

THE COURT: Call down and have someone bring them up.

(Thereby, the reporter received the aforementioned notes at the time noted 10:55 A.M.)

THE COURT: You want to come up and help me, Mr. Appleby?

(Thereby, the abovementioned testimony was located and read to the Court and counsel.)

THE COURT: Do you want the charge or don't you? We have kept them waiting a half hour on this

thing. We have to press ahead.

MR. BERNARD: Yes, I would like the Court to admonish the jury that he denies --

THE COURT: I will read it just the way I read it to you a moment ago, with slight editing. It's essentially what we do. We make slight edits. Bring in the jury.

(Thereby, the jury entered the Courtroom at the time noted 11:03.)

THE COURT: Ladies and gentlemen, I made two errors in my charge. One was when I gave you instructions with respect to character evidence, I, through a lapse of memory, I neglected to point out to you that there was character testimony also on behalf of Mr. and Mrs. Piccirillo. I think I restricted the character instructions to Mr. Mercogliano but you will recall that there was character testimony on behalf of the Piccirillo's also and you should bear those instructions in mind with respect to that testimony also.

Now, in addition, in my charge I stated to you that Carmine Mercogliano denied having told the agents that he had sold firearms to others in the past. That was in part an error on my part. What I should have said was this: Carmine Mercogliano

admits having told the agent that he had sold a machine gun to another in the past, but he does now deny the truth of this statement. It's my recollection, and it's your recollection that controls, that Carmine Mercogliano denied on the witness stand having told the agent that he had sold some 75 guns to others. With those additional instructions to the charge, I believe it's complete.

Now, if you would bring forth the Marshals -- Would the Marshal step forward please and alternate jurors, your time has come, unfortunately or fortunately, depending on how you look at it, your fellow jurors remain healthy and you are not called to take their place. When a member gets sick or a member of his or her family gets sick, they are called away, but in this case, it didn't happen. You are dismissed with the thanks of the Court for remaining with it for the entire case. You are to report back to the central jury room and pick up everything you may have by way of coats or anything you may have in the jury room and you may proceed downstairs. I don't know if the central jury will have anything for you but go downstairs with the Court's thanks. Swear in the Marshals.

(Thereby, the Marshals were duly sworn by the

Clerk of the Court at the time noted 11:07 A.M.)

THE COURT: Now, ladies and gentlemen, you may discuss the case.

(Thereby the jury was dismissed for their deliberations at the time noted 11:03 A.M.)

THE COURT: Yes, what I would like to do is assemble the exhibits, without the bullets and give it to the Marshals after all sides have checked. If they want the indictment, I will give them a copy of the indictment, if they ask for it. They usually do. I don't know whether they will do it in this case or not but I will give it to them and I would assume it will be necessary to reassemble everybody. My normal practice is to let you all go to lunch between 1 and 2 and have the Marshal go to lunch at 1, which takes about an hour for the lunch to get to them, and instruct the jurors not to ask questions or send notes between the hours of 1 and 2.

MR. APPLEBY: With respect to the guns that were seized on the date of the arrest, there is a whole carton of weapons. Do you intend to send those into the jury as well or just the weapons we have displayed?

THE COURT: I would send the ones that were

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